STATE OF MICHIGAN

COURT OF APPEALS

ANGEL JONES, Plaintiff-Appellee,	UNPUBLISHED July 24, 2014
v	No. 311051 Wayne Circuit Court
HOME-OWNERS INSURANCE COMPANY, Defendant-Appellant.	LC No. 10-002883-NF

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

PER CURIAM.

Plaintiff Angel Jones brought a first-party no-fault action against defendant Home-Owners Insurance Company after sustaining foot and shoulder injuries in an automobile accident. The parties resolved most of their disputes and Home-Owners paid Jones various benefits. But a single, lingering issue remained unresolved: whether Jones was temporarily unemployed at the time of the accident and entitled to work-loss benefits under MCL 500.3107a. The parties submitted this question to a jury.

At trial, Home-Owners conceded that Jones had suffered injuries during the accident, she had been actively seeking work when the accident occurred, and she continued to actively seek work thereafter. However, Home-Owners vigorously disputed that Jones would have obtained any employment. The crux of Home-Owners's proofs and arguments was that Jones lacked any evidence of an actual job offer. Thus, according to Home-Owners, Jones's evidence failed to establish that she was only "temporarily unemployed" before the accident.

The jury credited Jones's evidence on this question. Home-Owners now appeals as of right, contending that the trial court erred by failing to grant a directed verdict or judgment notwithstanding the verdict (JNOV) in its favor. Because Jones presented legally sufficient evidence of her temporary unemployment, we affirm.

I. FACTS AND PROCEEDINGS

In August 2007, Jones commenced employment with the Origami Brain Injury Rehabilitation Center as a patient care technician. She worked a 12-hour shift four days per week. By September 2008, Origami had laid off Jones and relegated her to "on call" status. Jones received but a handful of calls for shift coverage and accepted only one of them. Jones testified that she could not continue to work at Origami because as a single mother of four children, the irregular hours prevented her from attending to their needs.

Before and after becoming an "on call" employee, Jones searched for other full-time work. She described her efforts as follows: "I went to the Michigan Works website. I updated my resume. I went to Career Builder.com. I put a resume there." Jones' oldest son corroborated his mother's efforts to find employment. On Friday, January 9, 2009, just two days before the accident, Jones received a lead on a job she felt confident that she would obtain. Jones's youngest son suffers from a disability called "sensory integration disorder." Her son's counselor, Pamela Green, brought Jones an employment posting for "a parent advocate" and, according to Jones, recommended her for the job. Jones explained that one of the job requirements was "to have a child that has disabilities." Jones introduced into evidence the posting and a letter authored by Green stating that "Ms. Jones would be a good candidate." Jones believed she possessed ample qualifications for the job and intended to formally apply on Monday, January 12, 2009. The auto accident that occurred on Saturday, January 10, 2009 precluded Jones from applying.

Jones also presented evidence regarding an employment opportunity that arose *after* the accident. Erica Martin, an employee of Michigan Rehabilitation Services, testified that in December 2011, an employer known as "Peckham" notified Martin of interest in training Jones to work in a passport call center. Martin testified as follows concerning her experience with clients referred to Peckham: "If the individual passes the assessments required and they perform well in the initial first couple weeks, they have been hired, yes." Jones had not started the training when the trial commenced in January 2012.

Following the presentation of Jones's case-in-chief, Home-Owners's counsel moved for a directed verdict, contending that Jones failed to prove that she would have been employed were she not injured. Specifically, Home-Owners contested the existence of proof that Jones would have been employed but for the accident. Counsel for Home-Owners argued as follows:

> While there may be some question of fact on the Record as to whether plaintiff quit or was laid off, there is no dispute on the Record and there's no question of fact that as of December 3 or December 4, [2008,] plaintiff was not employed. And she was not employed at the time of the motor vehicle accident on January 10th, 2009. And thus, her claim to seek wage loss benefits is pursuant to a theory that she was temporarily unemployed.
>
> Your Honor, the Court has indicated to both parties based on [a] ruling prior to the start of trial that the instruction to the jury on temporarily unemployed state[s] that the plaintiff has the burden of proof on each of the following propositions. That she was actively seeking employment at the time of the accident. We have some proofs of that.
>
> That but for the accident, she would have continued to actively seek employment. We have proofs of that.
>
> Thirdly, that she would have become employed after the motor vehicle accident if she had not been injured.

> There is an absolute void of evidence on that third element. We have had testimony only from, if you will, the employee side of that equation. In order for the jury to . . . render an opinion on whether she was temporarily unemployed, they must have some evidence on which to base that decision that she would have had a job on January 10th, 2009, or at some point thereafter.
>
> There's none of that, absolute void for evidence on the third element of temporarily unemployed, i.e., would have become employed, which is consistent with the statute, [MCL 500.3107a]. . . .[1]

The trial court denied the motion on the basis of the testimony regarding Jones's likelihood of becoming employed with Peckham.

Home-Owners then presented the testimony of an Origami employee who claimed that before being terminated from Origami, Jones requested a reduction in her hours from full- to part-time in September 2008, and voluntarily quit on December 3, 2008. In rebuttal, Jones's counsel called Matthew Bowman, a Home-Owners claims representative. Bowman testified that Home-Owners had agreed to pay Jones work-loss benefits for most of 2009, but discontinued the benefits after determining that Jones did not provide reasonable proof that she would have been employed after the accident but for her injuries. According to Bowman, reasonable proof would have consisted of "[s]omething from the employer that would have shown a potential job offer or something . . . that would indicate work would have been performed." Bowman disagreed with the previous claims representative's decision to pay Jones any work-loss benefits.

The jury found in Jones's favor and awarded her $38,124 in benefits owed and $42,698.88 in interest for overdue benefits. Home-Owners moved for JNOV, contending that

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[1] The dissent posits that JNOV should have been granted because Jones failed to "show that her accident-related injuries prevented her from taking a position." Home-Owners never made this argument in the trial court, and has not raised this issue on appeal. Nor did Home-Owners contest that Jones's evidence created a jury question regarding her eligibility for work-loss benefits under MCL 500.3107(b). Moreover, record evidence supports that Jones's accident-related injuries prevented her from working. She sustained fractures in several bones in her foot which disrupted the joints in her arch. Two surgeries were necessary to repair the damage. After the first, she remained non-weightbearing for 12 weeks. The operating surgeon described her injury as "severe." He testified:

> The[] individuals who have an injury like she had do not return to normal function. Essentially what she did was she took the front half of her foot and ripped it off the back half of her foot. And you can put that back in the correct location, you can put hardware in to hold it there. While those people get back to doing their daily tasks and things like that, their foot never goes back to normal.

Given this evidence, Home-Owners's election against challenging by motion for directed verdict or JNOV whether Jones's injury was vocationally disabling makes good sense.

Jones did not supply evidence concerning her potential employment with Peckham to Home-Owners within the three-year period available for a work-loss claim. Home-Owners also reiterated that Jones had failed to demonstrate a reasonable likelihood of employment by producing documentation from a prospective employer that a job was available within Jones's skill set. The trial court denied the motion, reasoning, "[W]hen we went to trial, we had the plaintiff testify as to how she was going to work and what she did to get work. We had the plaintiff's son go up there and say she was capable before the accident. And we have Erica Martin."

II. ANALYSIS

We review de novo a trial court's rulings on motions for a directed verdict and JNOV. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 599; 792 NW2d 344 (2010). The court may grant a motion for a directed verdict or JNOV only if the trial evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Id*. We also review de novo questions of statutory interpretation. *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

Two closely related sections of the no-fault act, MCL 500.3101 *et seq*., guide our resolution of this case. MCL 500.3107(b) provides that a no-fault insurer is liable for payment of work-loss benefits "consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." Section 3107a addresses situations involving persons who are "temporarily unemployed" at the time of an accident and suffer disabling injuries precluding employment:

> Subject to the provisions of section 3107(1)(b), work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident.

Our Supreme Court in *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 153; 350 NW2d 233 (1984), has explained that § 3107a

> allows persons temporarily unemployed at the time of an automobile accident to recover benefits notwithstanding that they have no existing wage, and it allows those already receiving work-loss benefits to continue receiving benefits for those temporary periods when they would have had no wage had the accident not occurred.

Section 3107a "applies when a claimant suffers an *unavailability* of work at the time of the accident." *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 469; 521 NW2d 831 (1994) (emphasis in original). An individual may qualify as "temporarily unemployed" if she demonstrates that at the time of the auto accident, she was "actively seeking employment and there is evidence showing the unemployed status would not have been permanent if the injury had not occurred." *Frazier v Allstate Ins Co*, 231 Mich App 172, 176; 585 NW2d 365 (1998).

Home-Owners initially contends that a directed verdict should have entered in its favor because "the evidence demonstrated that she would have been unemployed for the entire three-

year statutory limitation period regardless of whether the accident occurred." But viewed in the light most favorable to Jones, the evidence supported a reasonable inference that Jones would have obtained employment as a parent advocate had the accident not intervened. Jones presented evidence of her work history at Origami, where she had ceased working full-time four months before the accident. In the interim, Jones actively sought full-time work, a fact that Home-Owners did not contest.

Only days before the accident, Jones learned of a promising job opportunity and expressed confidence that she would have been hired. The trial evidence included the job posting and Green's recommendation that Jones "would be a good candidate" for the position. Whether Jones would have been hired constituted a question of fact. The jury was entitled to infer that based on Jones's employment record, her qualifications, and the job requirements, the patient advocate position likely would have been offered and accepted. Furthermore, we reject as legally unfounded Home-Owners's argument that benefits under § 3107a must be paid only when a claimant substantiates receipt of an actual job offer made before an accident. Had Jones's evidence solely consisted of a bare assertion that she would have found employment, the issue would be a closer one. However, Jones produced a job posting and evidence directly corroborating that she planned to apply and was qualified for the position. Viewed in the light most favorable to Jones, a reasonable jury could conclude that Jones was only temporarily unemployed at the time of the accident.[2]

Home-Owners next asserts that the trial court erred by refusing to grant its motion for JNOV. Home-Owners averred that "the only evidence presented to the Jury in this case on the likelihood of Plaintiff's employment subsequent to the subject motor vehicle accident was the opinion of Erica Martin, which opinion (likelihood of employment) was never presented to Defendant insurance carrier . . . and was not received by Defendant insurance carrier until the time of Trial[.]" According to Home-Owners, Jones's work-loss claim was time-barred because she failed to present during the three-year period after her accident evidence that she likely would have been employed.

[2] We note that our dissenting colleague authored this Court's opinion in *Frazier*, which sets forth the test we apply here: evidence that a plaintiff was, or "would have been seeking employment", and that "the unemployed status would not have been permanent if the injury had not occurred" suffices to establish "temporary unemployment" under § 3107a. *Frazier*, 231 Mich App at 176. Thus, we are puzzled by our dissenting colleague's apparent adoption of a new test, rendering "irrelevant" "a claimant's efforts to obtain employment before and after the accident." Apparently jettisoning *Frazier*, the dissent now asserts that a plaintiff must demonstrate a "causal connection" between the accident and her income loss. Home-Owners never made this argument. And we respectfully submit that the dissent's focus on causation is misplaced, as the phrase "temporarily unemployed" refers to the unavailability of employment, not the physical inability to perform work. *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 153; 350 NW2d 233 (1984).

The evidence supporting Jones's status as temporarily unemployed at the time of the accident was provided by Jones, her oldest son, and the exhibits regarding the patient advocate position for which she intended to apply. Home-Owners knew of this evidence when it discontinued Jones's work-loss benefits in December 2010. Martin's testimony was at best tangentially relevant to the likelihood that Jones would have obtained employment before the accident. Contrary to Home-Owners's argument on appeal, Jones supplied Home-Owners with the necessary documentation of her employment history and efforts; indeed, Home-Owners paid Jones benefits under MCL 500.3107a for 11 months. Irrespective of Martin's testimony, Bowman's admitted awareness of the factual basis for Jones's work-loss claim fatally undercuts Home-Owners's JNOV argument.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ Karen M. Fort Hood

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Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

SAAD, J. (*dissenting).*

I respectfully dissent. Because defendant is unable to show a causal connection between the accident and an "actual loss" of income—which is required to obtain wage-loss benefits pursuant to MCL 500.3107(1)(b), and, by incorporation, MCL 500.3107a—I would reverse the ruling of the trial court and grant defendant's motion for JNOV.

The concept of "work-loss benefits" is governed by MCL 500.3107(1)(b), which defines "work loss" as: "consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured." Work-loss benefits are intended to

> [c]ompensate injured persons for the income they would have received *but for* their accidents. Accordingly, a party seeking work loss benefits under § 3107(b) must show actual loss; a mere loss of earning capacity is not sufficient. [*Davis v State Farm Mut Auto Ins Co*, 159 Mich App 734, 738; 407 NW2d 1 (1987), citing *Struble v DAIIE*, 86 Mich App 245, 251, 255–256; 272 NW2d 617 (1978) (emphasis added).][1]

MCL 500.3107a takes this measured definition of work loss benefits and applies it to a special category of accident victim: the "temporarily unemployed." It reads:

[1] See also *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 152; 350 NW2d 233 (1984) ("[s]tated otherwise, work-loss benefits compensate the injured person for income he would have received but for the accident").

> Subject to the provisions of section 3107(1)(b), work loss for an injured person who is temporarily unemployed at the time of the accident or during the period of disability shall be based on earned income for the last month employed full time preceding the accident. [MCL 500.3107a.]

As such, MCL 500.3107a allows "persons temporarily unemployed at the time of an automobile accident to recover benefits notwithstanding that they have no existing wage, and it allows those already receiving work-loss benefits to continue receiving benefits for those temporary periods when they would have had no wage had the accident not occurred." *MacDonald v State Farm Mut Ins Co*, 419 Mich 146, 153; 350 NW2d 233 (1984). The subsection of the statute applies "when a claimant suffers an *unavailability* of work at the time of the accident." *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 469; 521 NW2d 831 (1994) (emphasis original).

"[A]n insured may be found to be 'temporarily unemployed' where he is, or would have been but for the accident, actively seeking employment and there is evidence showing the unemployed status would not have been permanent if the injury had not occurred." *Frazier v Allstate Ins Co*, 231 Mich App 172, 176; 585 NW2d 365 (1998). A plaintiff who asserts that he is "temporarily unemployed" must present "independent corroboration"[2] of both intent and actions taken to secure employment—a "bare assertion of intent to secure employment without any corroboration of such intent or actions taken to secure employment . . . is insufficient to render an injured party 'temporarily unemployed.'" *Id*., citing *Oikarinen v Farm Bureau Mut Ins Co of Mich*, 101 Mich App 436, 439; 300 NW2d 589 (1980).

MCL 500.3107a therefore requires claimants to demonstrate: (1) that they are "temporarily unemployed," in that they are "actively seeking employment" or "would have been but for the accident," and can provide "evidence showing the unemployed status would not have been permanent if the injury had not occurred"[3]; and (2) a "work loss" pursuant to MCL 500.3107(1)(b), in that the accident actually caused them to lose income, not a "mere loss of earning capacity."[4] It is thus possible for a claimant to be "temporarily unemployed" and not eligible for work loss benefits per MCL 500.3107a. "Regardless [of] whether plaintiff was 'temporarily unemployed,' under MCL 500.3107a, he must still show a 'loss of income from work an injured person would have performed . . . if he had not been injured.' In other words, [a temporarily unemployed] plaintiff must show the automobile accident caused an actual loss of

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[2] *Clute v Gen Accident Assurance Co of Canada*, 179 Mich App 527, 537; 446 NW2d 839 (1989).

[3] *Frazier*, 231 Mich App at 176.

[4] *Davis*, 159 Mich App at 738.

income." *Artrip v HBIC Enterprises, Inc*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2008 (Docket No. 277848), quoting MCL 500.3107(1)(b).[5]

Here, plaintiff did not show any "actual loss" of income that resulted from the accident. At the time of the accident, she was unemployed. Under MCL 500.3107(1)(b), a claimant's efforts to obtain employment before and after the accident are irrelevant—the only relevant inquiry is an actual loss of income that is caused by the claimant's accident-related injuries. Though plaintiff indicated the possibility of obtaining work as a parent advocate and at a passport call center, she was not offered a job, nor did she show that her accident-related injuries prevented her from taking a position. Accordingly, plaintiff did not demonstrate any causal connection between the accident and an "actual loss" of income, which is required to obtain wage-loss benefits pursuant to MCL 500.3107(1)(b), and, by incorporation, MCL 500.3107a. See *Davis*, 159 Mich App at 738.

Nor is plaintiff's effort to secure employment enough to qualify her for the protections of MCL 500.3107a. As noted, "an insured may be found to be 'temporarily unemployed' where he is, or would have been but for the accident, actively seeking employment *and there is evidence showing the unemployed status would not have been permanent if the injury had not occurred*." *Frazier*, 231 Mich App at 176 (emphasis added). Although plaintiff provided "independent corroboration" of both intent and actions taken to secure employment, she provided no "evidence showing [her] unemployed status would not have been permanent if the injury had not occurred." She is thus not "temporarily unemployed" per MCL 500.3107a, nor has she shown that she lost income or wages due to the injuries at issue, and therefore she is not entitled to wage-loss benefits.

Accordingly, I would reverse the ruling of the trial court and grant defendant's motion for JNOV.

/s/ Henry William Saad

[5] "Although unpublished opinions of the Court of Appeals are not binding precedent, they may . . . be considered instructive or persuasive." *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citations omitted); see also MCR 7.215(C)(1).